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Thomas W. Beetham

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THE COMMUNITY REINVESTMENT ACT AND INTERNET BANKS: REDEFINING THE COMMUNITY

INTRODUCTION

In the near future, developing technologies will revolutionize currency and the way in which we use financial institutions.¹ Imagine, for example, using a personal computer ("PC") at home instead of an automated teller machine ("ATM") to obtain some cash before leaving for an evening movie.² You click onto your bank's World Wide Web page on the Internet, type in a personal account access code and download fifty dollars to your computer.³ You then insert a plastic card that can store cash into the computer, transfer twenty dollars to the card for the movie—later to be electronically deducted by the cinema—and leave the remaining thirty dollars in the PC's "electronic wallet" for later Internet shopping.⁴ Indeed, the Internet is quickly becoming a means to complete a variety of financial transactions.⁵ Developments like these will increase the application of the Internet as a financial resource and, ideally, make financial institutions more accessible to all consumers.⁶

The surge of financial technology, products and opportunities, however, probably will not arrive unhindered.⁷ Current banking law may limit the range of available on-line activities because many regulatory provisions never accounted for an on-line world and are currently impracticable to apply.⁸ Although some flexibility in the law will permit these new technologies to develop fully, financial institutions

¹ See Thomas P. Vartanian, *A Cashless World*, CREDIT UNION MGMT., Feb. 1997, at 14, 14.

² See generally Edward Baig, *Your Friendly Banker, The Web*, BUS. WK., May 12, 1997, at 150, 151.

³ See generally *id.*

⁴ See generally *id.*

⁵ See *id.*; see also Lawrence Pinsky, *Banking By Computer: You Can Tell Electronic Banking is Catching On From the Proliferation of Options and Fees*, FIN. POST, Apr. 1, 1998, at 91.

⁶ See Brian Collins, *The Way Looks Clear to Confirmation of OTS Director*, NAT'L MORTGAGE NEWS, Oct. 6, 1997, at 2.

⁷ See generally 12 U.S.C. §§ 2901-2907 (1994).

⁸ See generally *id.*; see, e.g., Jennifer Kingson Bloom, *Puzzler: What's CRA Duty of an On-Line Bank? Banks, Regulators Ponder 'Reinvesting' in a Cyberspace 'Community'*, AM. BANKER, Jan. 7, 1997, at 18; Cindy Skrzycki, *OTS Eyes Challenges of Rule-Making for 'Virtual Banks'*, WASH. POST, Sept. 5, 1997, at G1.

must not be allowed to abandon their public policy obligations and responsibilities.⁹

The Community Reinvestment Act of 1977 (hereinafter, the "CRA" or the "Act"), obligates banks and thrifts to meet the credit needs of their communities.¹⁰ The CRA requires financial institutions to define the communities they serve, determine the credit needs of the communities and then take steps to meet those needs.¹¹ Within the meaning of the CRA, a bank's "community" generally includes those areas in which the bank has its main offices, branches, deposit-taking automatic teller machines ("ATMs") and a substantial portion of its loans.¹² It is a definition grounded in physical geography.¹³

Over the years, changes in the financial industry have altered the banking landscape.¹⁴ New institutions, not regulated by the CRA, are competing with traditional banks for the same customer deposit base.¹⁵ Furthermore, developments in information technology are expanding the landscape from a local to a national arena.¹⁶ An increasing number of banks and other financial institutions are finding a home on-line and are reaching out to new customers via the Internet.¹⁷ Most of these institutions accept deposits from outside their local markets.¹⁸ These deposits from "elsewhere" are adding up, raising a number of legal issues about how Internet banks will comply with the CRA.¹⁹ For instance, what constitutes "community" within the meaning of the CRA for a bank that serves customers over the Internet and accepts deposits from anywhere in the country?²⁰ Does extending credit to any consumer with a computer carry a reciprocal obligation to reinvest in the distant locations in which the customer lives?²¹ Does Internet banking

⁹ See generally 12 U.S.C. § 2901. In general, "regulated financial institutions" mean insured depository institutions. See *id.* § 2902(2).

¹⁰ See *id.* § 2901.

¹¹ See generally *id.*; 12 C.F.R. § 25.41 (1998).

¹² See 12 C.F.R. § 25.41(c)(2).

¹³ See *id.* § 25.41.

¹⁴ See Thomas P. Vartanian, *Many Evolutionary Factors Point One Way: The Internet*, AM. BANKER, Dec. 23, 1996, at 4A.

¹⁵ See *id.*

¹⁶ See A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1487 (1995).

¹⁷ See Doug Anderson, *PC Banking: A Brief Overview*, CREDIT WORLD, Mar.-Apr. 1997, at 32, 32. An increasing number of banks exist primarily in cyberspace: Principal Bank, Security First Network Bank and Atlanta Internet Bank. See *id.*; Pete Barlas, *Principal Financial Opens Online Bank*, INVESTORS BUS. DAILY, Mar. 18, 1998, at A9.

¹⁸ See Bloom, *supra* note 8, at 18.

¹⁹ See, e.g., *id.*; Collins *supra* note 6, at 2; Skrzycki, *supra* note 8, at G1.

²⁰ See Collins, *supra* note 6, at 2.

²¹ See Bloom, *supra* note 8, at 18.

for computer owners carry a scent of exclusivity that is antithetical to the spirit of the 1977 law?²²

Although these issues have not yet reached a critical point, regulators are grappling with how to apply the CRA to the growing number of institutions on-line.²³ This Note examines the challenge that Internet banks present to the CRA and suggests that although the CRA should afford Internet banks some flexibility to encourage the developing technology, it should also squarely address the emergence of these new entities and ensure they meet their public obligations. In Part I, this Note examines the original purpose and legislative intent behind enacting the CRA and surveys the CRA's regulatory framework.²⁴ In Part II, the Note reviews changes in the banking industry and the current surge of on-line banking activity.²⁵ Part III examines how these changes affect CRA enforcement.²⁶ Part IV suggests that a regulatory assessment based on "equality" rather than "community" will promote the objectives behind the CRA.²⁷ Finally, Part V evaluates various methods that the regulators could use to assess an on-line bank's compliance with the CRA.²⁸

I. THE COMMUNITY REINVESTMENT ACT

A. Purpose

A central function of the banking industry is to provide loans for residential and commercial development.²⁹ This function "places enormous power in the hands of lenders who decide, through the allocation of credit, which communities receive funds for development."³⁰ Senator William Proxmire (D-Wis.) introduced the CRA in 1977 on the assumption that financial institutions should owe a public obligation in return for the benefits they receive from the charters they are granted.³¹ Accordingly, in return for the benefit of being federally

²² See *id.*

²³ See *id.*; Collins, *supra* note 6, at 2; Skrzycki, *supra* note 8, at G1.

²⁴ See *infra* notes 29-95 and accompanying text.

²⁵ See *infra* notes 96-144 and accompanying text.

²⁶ See *infra* notes 145-75 and accompanying text.

²⁷ See *infra* notes 176-87 and accompanying text.

²⁸ See *infra* notes 188-244 and accompanying text.

²⁹ See David Evan Cohen, Comment, *The Community Reinvestment Act—Asset or Liability?*, 75 MARQ. L. REV. 599, 599 (1992).

³⁰ *Id.*

³¹ See 123 CONG. REC. 1958 (statement of Sen. Proxmire). Senator Proxmire stated that "a public charter conveys numerous economic benefits and, in return, it is legitimate for public policy and regulatory practice to require some public purpose" *Id.*

insured, the CRA attempts to encourage banks to serve the credit and deposit needs of their surrounding communities, including low- and moderate-income areas.³²

Congress enacted the CRA in 1977 to discourage banks from redlining and community disinvestment, two closely related activities that are contrary to public policy.³³ Redlining is the practice of financial institutions actually or figuratively drawing red lines on city and town maps to determine which neighborhoods they deem creditworthy and which they consider too risky to service.³⁴ These financial institutions systematically avoid all lending and service activities in the neighborhoods they exclude because of economic conditions or racial factors unrelated to loan-loss experience.³⁵ Therefore, denying access and credit to these communities is not rationally related to financial principles; rather, the financial institutions make decisions based on generalizations associated with the neighborhood.³⁶ Whether racially or economically based, these institutions deny access to particular neighborhoods as a whole without considering lending to applicants on a case-by-case basis.³⁷

Community disinvestment, a slightly different activity, is the failure of financial institutions to reinvest in the communities from which they obtain deposits.³⁸ Community groups pushed for CRA passage, outraged by banks that received millions of dollars in deposits from community residents while making virtually no loans in those communities.³⁹ Proponents of the Act argued that the funds deposited in a local bank by a neighborhood should be reinvested and remain in that neighborhood to some extent.⁴⁰ If funds are drained away from an

³² See 12 U.S.C. § 2901 (1994). The congressional purpose of the CRA is simply stated: The Congress finds that (1) regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business; (2) the convenience and needs of communities include the need for credit services as well as deposit services; and (3) regulated financial institutions have a continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.

Id.

³³ See Overby, *supra* note 16, at 1454. Redlining is discussed at length in the legislative history of the CRA. See, e.g., 123 CONG. REC. 17,630 (1977).

³⁴ See 123 CONG. REC. 1958 (statement of Sen. Proxmire).

³⁵ See Overby, *supra* note 16, at 1450. Studies have demonstrated that the practice has a disproportionately high impact on minority groups. See Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 PAC. L.J. 1071, 1077 (1987).

³⁶ See Overby, *supra* note 16, at 1451.

³⁷ See *id.* at 1450-51.

³⁸ See *id.* at 1451.

³⁹ See Art, *supra* note 35, at 1082; Overby, *supra* note 16, at 1457.

⁴⁰ See Cohen, *supra* note 29, at 601.

economically struggling community and invested in a distant healthy one, the danger is that the poor community will continue its decline while the healthy community will continue to grow—at the poor community's expense.⁴¹ The CRA attempts to protect struggling communities from suffering this loss of funds.⁴²

Through the CRA, Congress wanted to ensure that banks did not ignore communities perceived to be a high risk without considering lending to applicants on an individual basis.⁴³ Congress recognized, however, that there are inherent dangers in regulating banks too strictly.⁴⁴ Opposition to the bill led Congress specifically to refuse to go so far as to require credit allocation.⁴⁵ Credit allocation would require banks to meet loan quotas for each region they served.⁴⁶ Senator Robert B. Morgan (D-N.C.) stated, "If bills of this nature are pushed to their ultimate conclusion, then the day will come when a financial institution may be forced to make an unsound loan in a specific location in order to meet its quota of loans in a given locality."⁴⁷ Faced with this concern, Congress had to balance carefully the competing interests of a bank's public obligation to ensure community access and loan opportunity with a bank's need for independence to select profitable investment opportunities.⁴⁸ Congress attempted to strike this balance through the CRA by encouraging banks to consider all income groups in the regions they served, but not *requiring* them to meet pre-set quotas.⁴⁹

B. *The Regulatory Framework*

Four regulatory agencies, charged with supervising and examining the financial institutions that must comply with the CRA, jointly developed its basic regulatory framework.⁵⁰ To promote uniformity, the four regulators—the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Fed"), the Federal Depository Insurance Corporation ("FDIC") and

⁴¹ See MEIR KOHN, FINANCIAL INSTITUTIONS AND MARKETS 289 (1994); see also 123 CONG. REC. 17,630 (1977).

⁴² See 12 U.S.C. § 2901.

⁴³ See Overby, *supra* note 16, at 1446.

⁴⁴ See *infra* notes 45–49 and accompanying text.

⁴⁵ See Overby, *supra* note 16, at 1455.

⁴⁶ See 123 CONG. REC. 17,628 (1977) (statement of Sen. Morgan).

⁴⁷ *Id.*

⁴⁸ See Cohen, *supra* note 29, at 613.

⁴⁹ See *id.*

⁵⁰ See Art, *supra* note 35, at 1087.

the Office of Thrift Supervision ("OTS," formerly the Federal Home Loan Bank Board), each having jurisdiction over different institutions—promulgated regulations that are nearly identical, except for minor technical and procedural variations.⁵¹

The CRA obligates each appropriate regulatory agency "to use its authority when examining financial institutions, to *encourage* such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."⁵² The regulatory agency must assess a financial institution's records of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods.⁵³ The agency then assigns each institution a rating based upon its assessment and then takes the rating "into account" in its evaluation of the institution's application for a deposit facility.⁵⁴

The delineation of "community" is of "key importance because it defines the areas within which the financial institutions will be held accountable for providing satisfactory and nondiscriminatory services."⁵⁵ The financial institutions are allowed to determine their own "assessment area," which affords them the flexibility to outline, to some extent, the scope of their responsibilities.⁵⁶ The regulations define assessment area in terms of physical geography.⁵⁷ In general, the assessment area must consist of one or more metropolitan statistical areas ("MSAs") or one or more contiguous political subdivisions, such as counties, cities or towns.⁵⁸ Furthermore, it must include the "geogra-

⁵¹ See *id.* The OCC regulates national banks; the Fed regulates state chartered banks that are members of the Federal Reserve System and bank holding companies; the FDIC regulates state chartered commercial and savings banks that are not members of the Federal Reserve System; and the OTS regulates savings associations and savings and loan holdings companies. See 12 U.S.C. § 2902(1). Each federal supervisory agency has its own set of regulations. See 12 C.F.R. §§ 25.11–.65 (1998) (OCC); 12 C.F.R. §§ 228.3–.51 (1997) (Fed); 12 C.F.R. §§ 345.3–.51 (1997) (FDIC); 12 C.F.R. §§ 563e.3–.51 (1997) (OTS). For convenience, footnotes hereinafter will refer to the OCC regulations.

⁵² 12 U.S.C. § 2901(b) (emphasis added).

⁵³ See *id.* § 2903(1). "Low-income" means an individual income that is less than 50 percent of the area median income, or a median family income that is less than 50 percent. See C.F.R. § 25.12(n)(1). "Moderate-income" means an individual income that is at least 50 percent and less than 80 percent of the area median income, or a median family income that is at least 50 and less than 80 percent. See *id.* § 25.12(n)(2).

⁵⁴ See 12 C.F.R. § 25.28. Applications for a deposit facility include applications for a bank charter, deposit insurance, establishment of a domestic branch, relocation of an office, approval of a merger or reorganization of a regulated financial institution, or the acquisition of shares in a regulated financial institution. 12 U.S.C. § 2902(3).

⁵⁵ See Art. *supra* note 35, at 1088.

⁵⁶ See 12 C.F.R. § 25.41.

⁵⁷ See *id.*

⁵⁸ *Id.* § 25.41(c)(1).

phies" in which the institution has its main office, branches and deposit-taking ATMs, as well as the surrounding geographies in which it has originated or purchased a substantial portion of its loans.⁵⁹

The current regulations provide a slightly different delineation of "community" for wholesale or limited purpose banks.⁶⁰ Wholesale institutions are not in the business of extending home mortgage, small business, small farm or consumer loans to retail customers.⁶¹ Limited purpose institutions offer a narrow product line—such as credit card, motor vehicle or industrial loans—to a broader market.⁶² Although these banks' assessment area also generally consists of one or more MSAs or one or more contiguous political subdivisions, in which they have their main office, branches and deposit-taking ATMs, it does not also include the surrounding geographies in which they have originated or purchased a substantial portion of their loans.⁶³

The regulations further provide another alternative delineation of "community" for banks that serve a military customer base.⁶⁴ This definition of assessment area offers an alternative to the geographic-based assessment area.⁶⁵ The regulation states that a bank—whose business predominantly consists of serving the needs of military personnel or their dependents who are not located within a defined geographic area—may delineate its entire deposit customer base as its assessment area.⁶⁶

In its first fifteen years of application, many CRA critics claimed that it lacked significant bite and was too vague and abstract, making compliance difficult to define and enforce.⁶⁷ In response to this criticism, the regulatory agencies adopted new regulations in April, 1995 that abandoned a subjective, efforts-based criteria for assessing whether an institution was meeting community credit needs, for a more quantitative evaluation procedure designed to measure a bank's results in meeting the credit needs of its assessment area.⁶⁸ Although the CRA still relies on encouragement rather than providing for monetary damages or criminal penalties to discipline institutions for inade-

⁵⁹ See *id.* § 25.41(c)(2).

⁶⁰ See *id.* § 25.41(b).

⁶¹ See 12 C.F.R. § 25.12(w).

⁶² See *id.* § 25.41(o).

⁶³ See *id.* § 25.41(b).

⁶⁴ See *id.* § 25.41(f).

⁶⁵ See *id.* § 25.41(c)(1).

⁶⁶ See 12 C.F.R. § 25.41(f).

⁶⁷ See, e.g., Art, *supra* note 35, at 1086; Craig E. Marcus, Note, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate-Income Lending*, 96 COLUM. L. REV. 710, 727 (1996).

⁶⁸ See Overby, *supra* note 16, at 1469.

quate reinvestment, the method in which the agencies determine an institution's CRA rating changed, now focusing on actual results rather than mere efforts.⁶⁹

The CRA attempts to *encourage* financial institutions to reinvest in their community based upon threats of delay in processing an application, adverse publicity and embarrassment.⁷⁰ To encourage financial institution compliance, the regulatory agencies may delay a bank's application (for relocation, expansion, merger, charter, etc.) by conditioning approval upon the bank improving its CRA performance rating.⁷¹ They may also deny applications for a financial institution with a poor CRA rating.⁷² Furthermore, financial institutions must publicly disclose their CRA rating.⁷³ Congress hoped that the potential damage to the reputation of banks from a poor CRA rating would provide an added incentive to improve their performance.⁷⁴ At a minimum, the CRA has created a heightened awareness of the financial institution's role in the community and its responsibility to serve the needs of low- and moderate-income neighborhoods.⁷⁵

Although enforcement of the CRA regulations clearly focuses on the types of activities that merit CRA credit, the overall rating process still affords a great deal of discretion to the regulators.⁷⁶ The regulations provide that all assessments of performance are to be made *in context*, focusing on "safe and sound" considerations and the individual institution's assessment area, business focus, and capacities.⁷⁷ Therefore, the CRA still accounts for an institution's need for autonomy in deciding where it will make its loans available.⁷⁸ A central CRA goal is to ensure that lending and investment activities are not discriminatory.⁷⁹ A bank must have valid reasons for denying loans and further, must provide equal access to its services in its assessment area.⁸⁰

⁶⁹ See *id.*

⁷⁰ See *infra* notes 71-74 and accompanying text.

⁷¹ See 12 C.F.R. § 25.29(d).

⁷² See *id.*

⁷³ See 12 U.S.C. § 2906(b).

⁷⁴ See Marcus, *supra* note 67, at 718.

⁷⁵ See Art, *supra* note 35, at 1138; Cohen, *supra* note 29, at 627.

⁷⁶ See Overby, *supra* note 16, at 1479.

⁷⁷ See 12 U.S.C. §§ 2901(b), 2903; 12 C.F.R. § 25.21(b). Examiners will consider as appropriate the economic and demographic characteristics of the assessment area(s); lending, investment and service opportunities in the assessment area(s); the institution's product offerings and business strategy; the institution's capacity and constraints; the prior performance of the institution and, in appropriate circumstances, the performance of similarly situated institutions; and other relevant information. See 60 Fed. Reg. 22,162-63 (1995).

⁷⁸ See Overby, *supra* note 16, at 1479.

⁷⁹ See *supra* notes 33-43 and accompanying text (discussing purpose of CRA).

⁸⁰ See *supra* notes 33-43 and accompanying text.

The general evaluation criteria that the regulating agencies use to determine the CRA rating for a financial institution consists of a three-category performance test that considers an institution's lending, investment and service activities.⁸¹ The appropriate regulating agency determines the institution's CRA rating by a combination of its scores in each of these areas.⁸² The lending test measures an institution's record of meeting the credit needs of its assessment area through its lending activities.⁸³ This test is the most important of the three criteria and, accordingly, the regulations give it more weight than the other two tests.⁸⁴ The second prong of the evaluation criteria, the investment test, evaluates the degree to which a bank is meeting its requirements through qualified investments.⁸⁵ It attempts to reflect the actual deployment of institutional resources into the institution's assessment area.⁸⁶ Finally, the service test evaluates the availability, innovativeness and responsiveness of a bank's system for delivering retail banking and community development services.⁸⁷

A "community development test" is usually applied to wholesale and limited purpose banks instead of the three-test evaluation.⁸⁸ It is intended to evaluate the institution's record in making qualified investments, in community development lending and in providing community development services.⁸⁹ The regulators consider the number and amount of such investments, loans and services provided by the institution, the complexity and innovativeness of those investments, loans and services, and the institution's responsiveness to community credit and community development needs.⁹⁰ Regulators may consider the qualified investments, community development loans and community development services that benefit areas *outside* the bank's assessment

⁸¹ See 12 C.F.R. §§ 25.22–24.

⁸² See 60 Fed. Reg. 22,162–63 (1995). The regulatory agencies will convert the five category measurements for each individual test—Outstanding, High Satisfactory, Low Satisfactory, Needs to Improve and Substantial Noncompliance—into a four-category CRA rating—Outstanding, Satisfactory, Needs to Improve and Substantial Noncompliance—by using a matrix of points for the component in the lending, investment and service tests. See generally Samuel J. Malizia, *Evolution of the Community Reinvestment Act Regulations and Related Issues*, 41 CONSUMER FIN. L.Q. REP. 38 (1995).

⁸³ See 12 C.F.R. § 25.22.

⁸⁴ See Malizia, *supra* note 82, at 38. If the institution's point total exceeds three times its lending test score, then its assigned CRA rating is recalculated by weighting the lending score by three times. See *id.*

⁸⁵ See 12 C.F.R. § 25.23.

⁸⁶ See Overby, *supra* note 16, at 1471.

⁸⁷ See 12 C.F.R. § 25.24.

⁸⁸ See *id.* § 25.25.

⁸⁹ See Overby, *supra* note 16, at 1473–74.

⁹⁰ See 12 C.F.R. § 25.25(c).

area(s), if the bank has adequately addressed the needs within its assessment area(s).⁹¹ This different treatment is intended to account for the fact that wholesale and limited purpose institutions typically draw their resources from, and serve areas well beyond, their immediate communities.⁹²

Another alternative to the three-test evaluation procedure is available to those institutions that submit a "strategic plan" for meeting their CRA obligations.⁹³ The institution must submit a proposal that details measurable goals for achieving community development in the three performance categories and, in particular, how the bank plans to meet the needs of low- and moderate-income areas.⁹⁴ The plan must set forth measurable goals that constitute a "satisfactory" performance and may set forth goals that will constitute "outstanding" performance.⁹⁵

II. ON-LINE BANKING EMERGES

The future of on-line banking is bright and has finally come of age. By the year 2000, as many as fourteen million United States households could be banking on-line.⁹⁶ The vast majority of commercial banks will offer Internet banking.⁹⁷ In addition, many non-bank financial institutions will offer various bank-like products on-line, including interest-bearing checking accounts that will compete with traditional banks and savings institutions.⁹⁸

In the mid-1980s, banks made a significant, yet unsuccessful attempt to promote on-line banking.⁹⁹ This early attempt failed because the banks misjudged two things.¹⁰⁰ First, they believed that their customers were technologically sophisticated enough to use and enjoy the service.¹⁰¹ There was not only a lack of a sufficient customer base—few bank customers owned the PC with modem or screen phone that the

⁹¹ See *id.* § 25.25(c)(2).

⁹² See 60 Fed. Reg. 22,160 (1995).

⁹³ See 12 C.F.R. § 25.27.

⁹⁴ See *id.* § 25.27(f).

⁹⁵ See *id.*

⁹⁶ See Anderson, *supra* note 17, at 34.

⁹⁷ See *id.* at 32.

⁹⁸ See *id.* at 34.

⁹⁹ See JUPITER COMMUNICATIONS CO., THE 1996 HOME BANKING REPORT 9 (1996) [hereinafter JUPITER HOME BANKING REPORT].

¹⁰⁰ See *id.*; Patrick Lee, *The Cutting Edge: So Far, Online Banking is Mostly Wishful Thinking; Finance: Institutions Are Eager, But Many Consumers Are Hesitant. And Then There's That Peaky Issue of Profitability*, L.A. TIMES, Sept. 30, 1996, at D1.

¹⁰¹ See JUPITER HOME BANKING REPORT, *supra* note 99, at 9.

services required—but customers were unfamiliar with using on-line products and lacked trust in the service.¹⁰² Second, they believed that customers would pay for the convenience of home banking.¹⁰³ The banks accordingly charged their customers monthly fees and transaction-based fees.¹⁰⁴ Customers, however, were neither ready for the product nor willing to pay for it.¹⁰⁵

Home banking is nonetheless making a comeback, buoyed by the flood of interest in the Internet and on-line services such as America Online ("AOL").¹⁰⁶ The emergence of the PC as a common household appliance and information resource has helped the home banking industry to succeed.¹⁰⁷ Today's consumers are not only better technologically prepared for these types of services, but now demand and expect them.¹⁰⁸ Jupiter Communications, a market research firm, estimated that the number of on-line banking households reached 4.5 million at the end of 1997, up from 2.5 million in 1996.¹⁰⁹ Jupiter predicts that by the year 2002, more than eighteen million households will make some 1.4 billion transactions.¹¹⁰ The number of United States households indicating that they have an interest in PC banking also has increased greatly, from nine percent in 1991 to eighteen percent in 1996.¹¹¹

Banks use a number of alternatives to reach their customers on-line.¹¹² The most simple method is through a direct link between the customer and the bank, using proprietary software supplied by the bank itself.¹¹³ A more common method uses this direct link in combination with personal finance software packages such as Intuit's Quicken, Microsoft's Money or Meca Software's Managing Your Money.¹¹⁴ A third alternative is to access the bank via a third party on-line service network provider like AOL or Prodigy.¹¹⁵ Although some of the early failed attempts at PC banking used these services, a

¹⁰² See *id.*; Lee, *supra* note 100, at D1.

¹⁰³ See Lee, *supra* note 100, at D1.

¹⁰⁴ See *id.*; see generally JUPITER HOME BANKING REPORT, *supra* note 99, at 9.

¹⁰⁵ See JUPITER HOME BANKING REPORT, *supra* note 99, at 9; Lee, *supra* note 100, at D1.

¹⁰⁶ See Anderson, *supra* note 17, at 33–34.

¹⁰⁷ See JUPITER HOME BANKING REPORT, *supra* note 99, at 10.

¹⁰⁸ See *id.*

¹⁰⁹ See Baig, *supra* note 2, at 150.

¹¹⁰ See *id.*

¹¹¹ See Anderson, *supra* note 17, at 32.

¹¹² See *id.* at 33.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

new wave of on-line banking was spurred by the opening of AOL's banking center in late 1996.¹¹⁶ By early 1997, more than eighteen financial institutions had established a presence on AOL.¹¹⁷

Another means to access banks on-line is via the World Wide Web ("Web") using an Internet service provider.¹¹⁸ Well over 600 banks have Web sites on the Internet.¹¹⁹ Although most of these are purely informational pages and serve as not much more than a marketing tool, many banks are developing transaction-based features for their sites.¹²⁰ At the very least, Web sites give banks a national presence. Many banks, including Wells Fargo, First Union and Bank of America, currently have fully functioning Internet banks, and more plan to open Web-based banks in the future.¹²¹ At least three of these, Security First Network Bank ("SFNB"), the Atlanta Internet Bank ("AIB") and Principal Bank, exist almost exclusively in cyberspace.¹²²

The Web-based approach will likely prove to be the most popular method with banks for many reasons.¹²³ It allows banks to customize their interface and maintain their identity, which they generally cannot do if they partner with an on-line service or software company.¹²⁴ In addition, banks can avoid sharing their customers with non-financial partners such as on-line services and software companies who may compete for the same customers in the future.¹²⁵ Moreover, banks now see on-line banking as more than a simple add-on service from which they can generate revenue, but as a necessary cost-saving feature.¹²⁶ Internet transactions cost banks far less than do transactions in physical

¹¹⁶ See Anderson, *supra* note 17, at 33-34.

¹¹⁷ See *id.* at 34. AOL has electronic member-only sites that group topics (such as sports, entertainment, finance, etc.), AOL proprietary content and related third party services. See generally JUPITER COMMUNICATIONS CO., THE 1994 AMERICA ONLINE REPORT: CAN THE MODEL HOLD? (1994). These third party servicers, like banks, individually contract with AOL to offer their service through AOL. See generally *id.* The AOL banking center is one such proprietary AOL service offering. See generally *id.*

¹¹⁸ See Anderson, *supra* note 17, at 34. Internet service providers often offer "shell" accounts whereby customers use third party Web browser software like Netscape's Internet Browser or Microsoft's Internet Explorer to connect with the Web. These shell accounts do not offer the additional proprietary content that an on-line service provider like AOL does.

¹¹⁹ See Baig, *supra* note 2, at 151.

¹²⁰ See *id.* at 150.

¹²¹ See Anderson, *supra* note 17, at 34.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See Baig, *supra* note 2, at 151.

branches.¹²⁷ A transaction in a full-service branch costs approximately \$1.07.¹²⁸ In contrast, the average telephone transaction costs banks 54 cents; ATM machines, 27 cents; PC banking, about 1.5 cents; and a Web transaction costs just a penny.¹²⁹ The banks can pass these savings on to their customers.¹³⁰ Now banks are using strategies to lure new customers, enticing them to try PC banking by eliminating the customer fees altogether.¹³¹ AIB, the cyberbank, is attracting new customers by offering higher rates on investment accounts than traditional banks.¹³²

The implications of Internet banking are enormous. As Lewis Levin, general manager of Microsoft's desktop finance division expressed, "The Internet provides the opportunity to do exactly what financial institutions have wanted to do for a long time—to get customers to go directly to them."¹³³ Increased access to information has enabled individual and corporate borrowers to identify non-local sources of capital.¹³⁴ Although informational constraints might once have largely limited depositors to their local bank, depositors now have sufficient information to invest their money in alternative financial institutions in distant parts of the country.¹³⁵ Technological advances have reduced the inconveniences of dealing with a geographically removed bank.¹³⁶ Customers no longer have to settle for what their local banks offer.¹³⁷ With Internet access, customers may broaden their shopping venue to the entire nation with the convenience of being at

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.* Normal processing fees are far more costly. AIB has taken the cost savings to the extreme, outsourcing most functions and passing the overhead savings onto their customers. See *infra* note 130.

¹³⁰ See Baig, *supra* note 2, at 150.

¹³¹ See *Internet Customers Bank on High Rates*, REPORT ON HOME BANKING & FINANCIAL SERVICES, Feb. 14, 1997, available in LEXIS, News Library, CURNWS file (hereinafter *Internet Customers*).

¹³² See *id.* AIB opened in October, 1996 offering a money market account paying a rate of 7% and interest checking paying 3% and offered certificates of deposit with annual percentage yields ranging between 6.00% (for six-month instruments) and 6.50% (for 30-month CDs). See *id.* AIB's rates compare with a national average percentage yield of 2.63% on money market accounts and 4.77% on six-month CDs. See *id.*

¹³³ See Drew Clark, *Microsoft Shows It's Catching On and Catching Up*, AM. BANKER, Dec. 10, 1996, at 20.

¹³⁴ See Overby, *supra* note 16, at 1487.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ For example, about 30% of Bank of America's home banking checking customers reside outside the 11 states in which the bank has a retail presence. See Baig, *supra* note 2, at 151.

home.¹³⁸ Moreover, they can now access their accounts 24 hours a day, 365 days a year.¹³⁹

The banks also benefit from the opportunity to expand their presence beyond their local geographical boundaries.¹⁴⁰ Banks recognize the opportunity to attract new customers and save costs on the Internet.¹⁴¹ Accordingly, they are increasingly offering better rates and lower fees to their on-line customers.¹⁴² Finally, Internet banking will continue to grow.¹⁴³ Even though the typical consumer may not be demanding Internet or interactive banking products from their bank today, that should change "as new generations of electronically proficient students enter the workforce."¹⁴⁴

III. ON-LINE BANKING RAISES THE CRA CHALLENGE

The developments in on-line banking present a host of problems that call for a reevaluation of the CRA. A primary problem is that the regulations define a bank's "assessment area" in terms of physical geography.¹⁴⁵ Banks must determine their assessment areas based on statistical, county and town maps in the areas in which they have a physical presence.¹⁴⁶ Not only does the nationalism of the banking system challenge the localism by which "community" is defined within the meaning of the CRA, but the concept of a wholly Internet bank challenges the definition to the extreme.¹⁴⁷ The "community" of a cyberbank is nowhere and everywhere at the same time. Conceptually, such a bank could accept deposits from customers in any town in any state in the country; a bank's reach is as broad as the Internet itself.¹⁴⁸ Without a "brick and mortar" branch, the assessment area as defined by the existing regulations simply fails to make sense.¹⁴⁹

A second problem is that on-line banking developments challenge the assumptions upon which the concept of community disinvestment

¹³⁸ See Robert Heady, *Highest Yields Are Online*, DENVER POST, Jan. 19, 1997, at 115.

¹³⁹ See *Banking on the Information Highway*, THE HINDU, Feb. 19, 1998, available in LEXIS, News Library, CURNWS file.

¹⁴⁰ See Baig, *supra* note 2, at 151.

¹⁴¹ See *Internet Customers*, *supra* note 131.

¹⁴² See *id.*

¹⁴³ See Baig, *supra* note 2, at 151.

¹⁴⁴ Vartanian, *supra* note 14, at 4A.

¹⁴⁵ See 12 C.F.R. § 25.41 (1998).

¹⁴⁶ See *id.*

¹⁴⁷ See *infra* text accompanying notes 148-49.

¹⁴⁸ See Bloom, *supra* note 8, at 18.

¹⁴⁹ See 12 C.F.R. § 25.41.

relies.¹⁵⁰ Historically, banking in the United States was primarily local.¹⁵¹ Federal and state laws reinforced the localism of banking.¹⁵² In recent years, however, not only have banks found creative ways to circumvent regulatory requirements—through such vehicles as franchising, Edge Act Corporations, bank holding companies, consumer or nonbank banks and ATMs—but also states have moved toward more interstate banking.¹⁵³ Community disinvestment assumes that banking is a local industry—that the bank, in fact, receives its deposits from the local community.¹⁵⁴ It fails, however, to recognize the nationalization of the financial system from developing technologies and the decreasing cost of information as well as industry consolidation and easing of state regulatory barriers.¹⁵⁵ It assumes that depositors from a bank's community would prefer the bank to reinvest in the community irrespective of profit and risk.¹⁵⁶ Yet banks also have an obligation to their depositors to make sound investments.¹⁵⁷ There is no guarantee that depositors from any specific community wish to sacrifice the profit and security they may obtain from their bank's investment in another community.¹⁵⁸ Congress was careful not to require credit allocation by the CRA because of this problem.¹⁵⁹ The results-based regulations,

¹⁵⁰ See Overby, *supra* note 16, at 1493.

¹⁵¹ See *id.*

¹⁵² See KOHN, *supra* note 41 at 252–54.

¹⁵³ See *id.* at 254–64. Edge Act corporations are a special type of bank authorized to engage in international banking and allowed to branch across state lines. See *id.* at 255. Multi-bank holding companies own several banks, often to circumvent branching restrictions. See *id.* at 256. Non-bank banks are institutions that accept checking deposits but do not make commercial loans. See *id.* at 257.

¹⁵⁴ See Overby, *supra* note 16, at 1483.

¹⁵⁵ See *id.* at 1483, 1487; see also KOHN, *supra* note 41, at 264, 267. Increased competition posed to local institutions by non-local or non-bank financial intermediaries have significantly transformed the credit service industry. See Overby, *supra* note 16, at 1486. Money market and mutual fund companies, diversified financial services companies, mortgage banks, investment banks and brokerage firms have all grabbed portions of the deposit, mortgage, credit card, commercial lending and retirement savings markets, eroding the total deposit base that the commercial banks rely on. See Vartanian, *supra* note 14, at 4A. These competitors likely offer either the same, or potentially even more competitive services than the local bank. See Overby, *supra* note 16, at 1486. These “institutions not only attract funds from depositors, that in the past might have gone to the local bank or thrift, but also offer credit products that compete with commercial bank loans.” *Id.* Moreover, they have done so without having to accept the responsibilities and costs of being regulated as depository institutions. See Vartanian, *supra* note 14, at 4A.

¹⁵⁶ See Overby, *supra* note 16 at 1493–94.

¹⁵⁷ See generally, Overby, *supra* note 16; KOHN, *supra* note 41.

¹⁵⁸ See Overby, *supra* note 16, at 1493–94.

¹⁵⁹ See *supra* notes 44–49 and accompanying text (noting congressional concerns about credit allocation).

however, may lead down this path if banks are not afforded leeway in the development of new technology-based services like Internet banks.¹⁶⁰

A final problem that the advancement in technology presents is that the target market of an on-line bank is, in itself, potentially exclusionary and arguably antithetical to the spirit of the CRA.¹⁶¹ Internet users not only must know how to use a computer with these services, but also have access to a computer, modem and an on-line or Internet service provider. International Data Corporation, a research firm, estimates that forty-four million households own computers, thirty million of them have modems and fourteen million have some type of on-line access.¹⁶² Although the estimates vary, research firms agree that on-line access is growing exponentially.¹⁶³ When compared to the total number of United States households, however, those with on-line access remain a vast minority of the total population.¹⁶⁴ Moreover, households utilizing PC banking are younger, better educated and have considerably higher average incomes.¹⁶⁵ Seventy three percent are employed in a managerial, professional, sales or technical job.¹⁶⁶ These households also have a higher-than-average usage of financial products such as money market deposit accounts, mortgages and mutual funds.¹⁶⁷ Accordingly, it is not surprising that households that use PC banking products have higher than average account balances than households overall.¹⁶⁸ Therefore, the revolution in banking technology could further exclude the low- and moderate- income communities that the CRA was intended to protect.¹⁶⁹

The 1995 regulations promulgated under the CRA clearly did not consider the emergence of on-line banks.¹⁷⁰ At present, neither the regulators nor the banks have an obvious solution to the technological

¹⁶⁰ See Overby, *supra* note 16, at 1496.

¹⁶¹ See Bloom, *supra* note 8, at 18.

¹⁶² See Vartanian, *supra* note 14, at 4A.

¹⁶³ See, e.g., Anderson, *supra* note 17, at 32; Baig, *supra* note 2, at 150; Vartanian, *supra* note 14, at 4A; *Banking on the Information Highway*, *supra* note 139.

¹⁶⁴ See Anderson, *supra* note 17, at 33. According to the 1990 census, the resident population of the United States was 249,632,692. See 20 THE WORLD BOOK ENCYCLOPEDIA 99 (1994). The 1994 estimated population of the United States was 258,120,000. See *id.*

¹⁶⁵ See Anderson, *supra* note 17, at 33. For an in-depth study on racial disparities in Internet usage, see Donna L. Hoffman & Thomas P. Novak, *Bridging the Racial Divide on the Internet*, SCIENCE MAGAZINE, Apr. 17, 1998, at 390.

¹⁶⁶ See Anderson, *supra* note 17, at 33.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See generally, 12 U.S.C. §§ 2901, 2903 (1994).

¹⁷⁰ See generally, 12 C.F.R. §§ 25.11-65.

changes that on-line banking presents.¹⁷¹ The regulators are struggling with the "assessment area" as it applies to banks whose activities are becoming ever national in scope and less tied to geography.¹⁷² The federal government has chosen to leave the approach open at present, allowing banks to develop their on-line technology before it decides to tighten the reins.¹⁷³

Furthermore, most Internet banks have put CRA issues on hold.¹⁷⁴ To date, these banks have focused on network security, marketing and simply developing a deposit base to make their services work and stay in business.¹⁷⁵ Nonetheless, as the forms of on-line banking expand, the regulatory agencies once again need to update the CRA. To reflect the expanding scope, emerging technology and increasing competition in the banking industry, the regulators should further consider the purpose behind the CRA so that they may appropriately apply the CRA to the changing industry.

IV. "EQUALITY" RATHER THAN "COMMUNITY"

Bill Gates, co-founder and Chief Executive Officer of Microsoft Corporation, once claimed that banks are dinosaurs.¹⁷⁶ If he is to be proven wrong, the regulations should afford banks some leeway to develop the next generation of services. As Comptroller of the Currency Eugene A. Ludwig put it, "You run the risk of killing the golden goose before it lays any eggs."¹⁷⁷ Banks need to compete with the other financial institutions already on-line by expanding their services to prepare for the next generation of products. If the CRA limits banks from developing a competitive on-line presence, they will be further disadvantaged.

At the same time, however, the federal government must not sacrifice the spirit of the CRA while it allows banks to launch their on-line based programs.¹⁷⁸ Until the Internet becomes readily available to the greater population, the federal government must carefully balance banks' needs for competitiveness, technological advances and

¹⁷¹ See, e.g., Bloom, *supra* note 8, at 18; Collins, *supra* note 6, at 2; Skrzycki, *supra* note 8, at G1.

¹⁷² See Skrzycki, *supra* note 8, at G1.

¹⁷³ See Collins, *supra* note 6, at 2.

¹⁷⁴ See Bloom, *supra* note 8, at 18; Skrzycki, *supra* note 8, at G1.

¹⁷⁵ See Bloom, *supra* note 8, at 18; Skrzycki, *supra* note 8, at G1.

¹⁷⁶ See Clark, *supra* note 133, at 20.

¹⁷⁷ Dean Anason, *Regulating E-Commerce: Damned If You Do . . .*, AM. BANKER, June 20, 1997, at 3.

¹⁷⁸ See 12 U.S.C. § 2901 (1994).

concern for sound financial markets with banks' public obligation to meet the credit needs of all income groups fairly.

The nationalization of the banking industry suggests that the regulators reevaluate the "localness" of the CRA that was originally tied to community disinvestment.¹⁷⁹ If based on a concept of equality, however, the CRA will still accomplish Congress's fundamental goal of meeting the credit needs of low- and moderate-income communities that otherwise might be denied fair access and evaluation.¹⁸⁰ Congress intended to discourage banks from denying access and credit to communities when the denial was not rationally related to financial principles.¹⁸¹ "Equality" rather than "community" should be the focus of regulatory scrutiny.¹⁸² Accordingly, the CRA should focus on encouraging banks to afford all customers equal access to their services and an equal opportunity to apply for loans that they would evaluate on a rational basis.¹⁸³ All income groups should have access to banking services, and banks should fairly evaluate any citizen's credit application.¹⁸⁴ Public policy demands that banks do not deny access or credit evaluation to customers without valid reasons—rejections must be rationally related to some financial purpose.¹⁸⁵ The federal government must not allow a bank to reject income groups because it drew a red line around a particular geographic area and decided not to lend there.¹⁸⁶ Therefore, policies based on equal access and equal opportunity will satisfy the spirit of the law, yet afford the necessary latitude for banks to grow in the on-line marketplace without fear of requiring credit allocation.¹⁸⁷

V. POSSIBLE SOLUTIONS

A benefit of the current geography-based definition of "community" within the meaning of the CRA is the inherent fairness of using a geographic region to assess a traditional bank's performance.¹⁸⁸ The region the bank decides to serve simply comes as is—with a mix of communities and income groups. If an on-line bank that accepts de-

¹⁷⁹ See *supra* notes 38–42 and accompanying text (on community disinvestment).

¹⁸⁰ See Overby, *supra* note 16, at 1438.

¹⁸¹ See *supra* notes 34–37 (on redlining).

¹⁸² See Overby, *supra* note 16, at 1438.

¹⁸³ See *id.*

¹⁸⁴ See *supra* notes 29–32 and accompanying text (discussing purpose of CRA).

¹⁸⁵ See *supra* notes 33–43 and accompanying text.

¹⁸⁶ See *supra* notes 34–37 and accompanying text.

¹⁸⁷ See Overby, *supra* note 16, at 1438.

¹⁸⁸ 12 C.F.R. § 12.41 (1998).

posits from customers from across the nation has no "brick and mortar" branches or deposit taking ATMs, however, it is overly burdensome to require it to reinvest in every location where it has depositors. This Part offers some possible solutions to the on-line banking CRA problem and evaluates their strengths and weaknesses in search of a resolution consistent with the dual goals of equal access and opportunity.¹⁸⁹

A. *Exclude On-line Deposits from the Assessment Area*

The challenge to the CRA that on-line banks present is how to treat the new on-line customers' deposit base. According to the CRA, a bank that has both a physical location and offers an on-line service must still meet its CRA obligations within its assessment area regardless of its on-line service offerings.¹⁹⁰ A simple solution, therefore, that essentially skirts the issue, would be to do nothing. The bank would still be responsible for meeting its CRA obligations within its previously defined assessment area.¹⁹¹

This response, however, simply ignores the assessment problems that an on-line banking service presents. That is, because the demographics indicate that on-line users are currently an exclusive, well-educated, high-income group, the bank would be selectively expanding its customer base to only these "desirable" customers without considering the needs of more low- or moderate-income communities.¹⁹² As on-line banking grows, an increasing on-line deposit base could undermine the policy goals of the CRA.¹⁹³ An even greater CRA challenge is to find an alternative assessment area for banks that have no physical presence.¹⁹⁴ By not changing the regulations, wholly Internet banks essentially would receive an exemption from the CRA.¹⁹⁵

B. *Customer-Base Assessment Area*

Under the 1995 regulations, the military community alternative delineation of assessment area offers a potential model to solve the on-line banking problem.¹⁹⁶ This approach would allow an on-line bank

¹⁸⁹ See *infra* notes 190-244 and accompanying text.

¹⁹⁰ See generally 12 C.F.R. §§ 25.11-.65.

¹⁹¹ See generally *id.*

¹⁹² See generally Anderson, *supra* note 17, at 32; see also *supra* notes 161-69 and accompanying text (discussing on-line banking customer demographics).

¹⁹³ See 12 U.S.C. § 2903(1) (1994).

¹⁹⁴ See 12 C.F.R. § 25.41.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* § 25.41(f).

without a physical presence to define its assessment area as consisting of its on-line customer base.¹⁹⁷ Although this approach circumvents the limitations of a geographical "community" definition, it presents a similar exclusivity problem.¹⁹⁸

At this early stage of on-line banking development, the mere existence of a purely Internet bank is basically a form of redlining in and of itself—but income-based rather than geographic-based. Because the demographics indicate that on-line users are currently an exclusive, well-educated, high-income group, the bank would only extend credit to "desirable" customers.¹⁹⁹ Therefore, if the assessment area includes only the bank's on-line customers, the delineation would be self-serving for the bank. That is, the bank would be meeting the needs of only high-income groups. To define the assessment area in terms of an on-line customer base at this point of on-line banking expansion would prove exclusionary.

Congress enacted the CRA to meet the credit needs of an institution's entire community, including the low- and moderate-income neighborhoods.²⁰⁰ Conceptually, on-line banking offers universal bank access to all communities regardless of geography.²⁰¹ Anyone with access to an on-line service would have access to the services provided by an on-line bank.²⁰² In the world today, however, knowledge and resources limit on-line access to the elite.²⁰³ Therefore, an on-line customer based definition of "community" is antithetical to the principles of equality in access and opportunity—at least until on-line services are more freely available to low- and moderate-income groups.²⁰⁴

In addition, this approach could result in a potentially enormous assessment area. Customers from any region in the country could gain access to the bank; and, although approximately only fourteen million households have a computer, modem and on-line service today, this number is ever expanding.²⁰⁵ Therefore, it would not only prove overly burdensome to require the bank to reinvest in all the locations where it receives deposits, but also would become equally burdensome for the regulatory agencies to evaluate the bank's performance properly.²⁰⁶

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See generally Anderson, *supra* note 17, at 32.

²⁰⁰ See 12 U.S.C. § 2903(1).

²⁰¹ See Bloom, *supra* note 8, at 18.

²⁰² See *id.*

²⁰³ See *supra* notes 161–69 and accompanying text.

²⁰⁴ See *supra* notes 178–87 and accompanying text.

²⁰⁵ See Anderson, *supra* note 17, at 34.

²⁰⁶ See 12 C.F.R. §§ 12.11–.65.

C. Cyberzoning

On-line banks initially may target only particular regions of the country where more high-tech customers are located. Therefore, another plausible, yet still unsatisfactory solution is for the on-line bank to use a "gateway" to limit customer access to a predefined geographic region that the bank selects to serve.²⁰⁷ Such a gateway would construct barriers, use them to screen for identity, and block PC users that try to access the bank from outside its assessment area.²⁰⁸

In another Internet context, United States Supreme Court Justice Sandra Day O'Connor suggested an Internet zoning model that provides an analogous concept.²⁰⁹ In 1997, in *Reno v. ACLU*, the Court held that the Communications Decency Act of 1996 prohibitions on "indecent transmission" and "patently offensive display" abridge freedom of speech protected by the First Amendment.²¹⁰ Justice O'Connor, concurring in part and dissenting in part, suggested that zoning law may be applicable to cyberspace, making it potentially possible to create "zones" on the Internet for adult-only material.²¹¹ Justice O'Connor stated that cyberspace differs from the physical world in that it is malleable.²¹² She noted that it is possible to construct barriers in cyberspace and use them to screen for identity making it more like the physical world and more amenable to a type of zoning law.²¹³ Similarly, through the use of gateway technology, on-line banks could delineate their assessment area using existing physical boundaries.²¹⁴

Although the above framework offers another possible solution, it once again limits the assessment area to a physical geography, thus countering many of the benefits that Internet connectivity provides.²¹⁵ Ideally, the Internet makes banking services available to anyone who can get on-line, regardless of geographic boundaries.²¹⁶ Eventually, an arena where banks compete nationally for customers from all income groups by offering better rates and services promotes greater access and opportunity.²¹⁷ Therefore, to limit expansion of on-line services

²⁰⁷ See *infra* notes 209-14 and accompanying text.

²⁰⁸ See *infra* notes 209-14 and accompanying text.

²⁰⁹ See *Reno v. ACLU*, 117 S.Ct. 2329, 2353, 2354 (1997).

²¹⁰ See *id.* at 2334.

²¹¹ See *id.* at 2353-54 (O'Connor, J., concurring in part and dissenting in part).

²¹² See *id.* at 2353 (O'Connor, J., concurring in part and dissenting in part).

²¹³ See *id.*

²¹⁴ See *Reno*, 117 S.Ct. at 2353; 12 C.F.R. § 25.41(c)(1).

²¹⁵ See *supra* notes 201-04 and accompanying text.

²¹⁶ See *supra* notes 201-02 and accompanying text.

²¹⁷ See *supra* notes 178-87 and accompanying text.

using gateway technology just as the industry is growing would be contrary to the benefits afforded by the Internet. Finally, at present, this solution faces the same problem of selective access—customers must have the means to access the on-line bank.²¹⁸

D. *The Wholesale or Limited Purpose Bank Model*

Another analogous model could be drawn from the flexibility the regulations afford to the wholesale and limited purpose banks.²¹⁹ Like on-line banks, wholesale and limited purpose banks typically draw their resources from and serve areas well beyond their immediate geographical communities.²²⁰ Accordingly, the regulations could define an on-line bank's assessment area in the same manner a wholesale or limited purpose bank's: consisting of one or more MSAs or one or more contiguous political subdivisions in which the institution has its main office, branches and deposit taking ATMs, but not where it has a substantial portion of its loans.²²¹ For the wholly Internet bank, this area could simply consist of that community in which it has its main offices.²²² This delineation would conform to the community development test, which permits consideration of community development activities that are outside of an institution's assessment area, but that are in a broader statewide or regional area that still includes the institution's assessment area.²²³ As a result, the bank "need not delineate a statewide or regional, rather than local, assessment area to receive consideration for these activities."²²⁴ In addition, the agencies could permit an on-line bank to include as a community development loan any loan that primarily benefits low- or moderate-income individuals, regardless of the loan's effect on community development.²²⁵ In this way, the regulations would encourage the on-line bank to serve the credit needs of low- and moderate-income groups, yet recognize that the bank services areas beyond its local region.²²⁶

Unfortunately, this solution is also not without problems. First, because the community development test does not consider borrower distribution, but only loan amount and volume, crediting any loan that

²¹⁸ See *supra* notes 201–04 and accompanying text.

²¹⁹ See 12 C.F.R. §§ 25.25, 25.41(b); see also *supra* notes 60–62 and accompanying text.

²²⁰ See 60 Fed. Reg. 22,160 (1995).

²²¹ See 12 C.F.R. § 25.41(b).

²²² See generally *id.*

²²³ See 60 Fed. Reg. at 22,171; see also *supra* notes 88–92 and accompanying text.

²²⁴ See 60 Fed. Reg. at 22,171.

²²⁵ See *id.* at 22,160.

²²⁶ See generally 12 U.S.C. § 2903(1); 12 C.F.R. § 25.41(b).

benefits low- and moderate-income individuals could significantly inflate performance under this test.²²⁷ Moreover, although it considers a bank's investment activities outside of its immediate local area, it still *limits* the review of the bank's activities to the geographic area that includes the institution's assessment area.²²⁸ Finally, the bank expands its on-line user base of high-income, desirable customers while receiving an exemption from meeting the credit needs of low- and moderate-income groups.²²⁹

E. Increase Access to On-line Services

In addition to a new "assessment area" definition, the regulations should encourage on-line banks to increase the availability of and access to their services.²³⁰ Both the regulators and on-line banks should continue to search for methods that would expose a greater portion of the "unknowing" public to both the bank's on-line services and the Internet in general. Under the three-test performance criteria and the community development test, regulators already examine a bank's innovativeness in responding to meet the needs of its community.²³¹

Assuming that the regulators can appropriately assess an on-line bank's "community," as an alternative to being rated under the lending, service and investment tests or the small institution performance standards, a bank could submit to its supervisory agency for approval a "strategic plan" detailing how the institution proposes to meet its CRA obligations.²³² The "strategic plan" option provides institutions an opportunity to tailor their CRA objectives to meet the needs of their community within the bounds of their specific capacity and expertise.²³³ Accordingly, on-line banks would be forced to think of creative solutions to make their services immediately more available to the communities they serve. Indeed, examples of how the government exposes the public to new technology already exist. Thirty million recipients of federal assistance or governmental subsidies will be introduced to electronic payments no later than January, 1999, by virtue of the passage of the Debt Collection Improvement Act of 1996.²³⁴ The

²²⁷ See 60 Fed. Reg. 22,160 (1995).

²²⁸ See *supra* notes 215-17 and accompanying text.

²²⁹ See *supra* notes 192-93 and accompanying text.

²³⁰ See generally 12 U.S.C. § 2901.

²³¹ See 12 C.F.R. §§ 25.24(c)(2), 25.25(c)(2).

²³² See 12 C.F.R. § 25.27; see also *supra* notes 93-95 and accompanying text.

²³³ See 60 Fed. Reg. 22,168 (1995).

²³⁴ See Vartanian, *supra* note 14, at 4A.

welfare legislation enacted in 1996 directs states to deliver food stamps electronically by 2002.²³⁵ Federal and state governments are distributing or planning to distribute various forms of benefits and assistance through smart cards, electronic transfer and other technological means to lower the costs borne by taxpayers.²³⁶ These types of programs will help to bring a greater population up to speed in a technological age and banks could mimic them.²³⁷

Some banks are already applying some creative solutions to facilitate access for customers that do not own a personal computer. The St. Louis-based Mark Twain Bank's distribution of DigiCash's "e-cash" product is an example.²³⁸ Normally, to get access to e-cash, a customer visits Mark Twain's Web site, fills out an application on-line and sends a deposit to the bank.²³⁹ Mark Twain then mails the customer an account identification, a password and instructions on how to download the e-cash software.²⁴⁰ As an alternative, Mark Twain is developing an e-cash stored-value disk for computer-less consumers.²⁴¹ The idea was developed for use in cybercafes, where consumers could exchange hard cash for a computer disk with e-cash dollars.²⁴² These disks could then be freely used at cybercafes and the like—analogueous to a stored value card, but with cash on the disk.²⁴³

Banks could take these ideas a step further to provide access to the Internet in communities that either need banks or simply have no means of access to the Internet. The recently-opened Security First National Bank's brick and mortar location in Atlanta offers free computer access to all customers.²⁴⁴ A bank could set-up kiosks that have Internet access in places like community centers. Instead of ATMs, banks could provide Internet access so customers could interface with their personal bank anywhere in the country. Finally, simply making their services alternatively accessible by telephone, banks may help to solve the problem. These examples show how innovative solutions can help increase access to consumers rather than limit it.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See E. Assata Wright, *Cash and Click: The Perils of Online Banking*, VILLAGE VOICE, Nov. 19, 1996, at 25.

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See Wright, *supra* note 238, at 25.

²⁴⁴ See Bloom, *supra* note 8, at 18.

CONCLUSION

The future of on-line banking is bright and has finally come of age. The vast majority of commercial banks will soon offer PC banking. By the year 2000, as many as fourteen million United States households could be banking on-line.

At present, neither the regulators nor the banks have an obvious solution to the problems these changes present to the geography-based CRA. The government has chosen to leave the approach open at present, allowing banks to develop the technology before it decides to tighten the reins. Nonetheless, as on-line banking expands, the regulators need to squarely address the problems the new developments introduce.

Internet banks conceptually extend equal access; that is, their services are equally accessible to anyone who can get on-line. Accordingly, the federal government should give on-line banks some room to develop these services, yet not abandon the fundamental purpose behind the CRA. Therefore, regulators need to reexamine the definition of a bank's "assessment area" within the meaning of the CRA to account for on-line banks that do not have a physical presence.

As the financial industry becomes ever national in scope, a policy based on "equality" rather than "community" should be the focus of regulatory evaluation. Accordingly, the CRA would still accomplish its fundamental goal of providing credit needs to low- and moderate-income groups, while circumventing the inflexible geographic definition of "community." Unfortunately, because the demographic group of on-line users primarily consists of high-income consumers, the mere existence of an on-line bank is a type of redlining in and of itself. Therefore, any solution should encourage banks to find innovative ways to make their on-line services more available to all income groups.

Thomas W. Beetham